

DAN BURTON, INDIANA  
CHAIRMAN

BENJAMIN A. GILMAN, NEW YORK  
CONSTANCE A. MORELLA, MARYLAND  
CHRISTOPHER SHAYS, CONNECTICUT  
ILEANA ROS-LEHTINEN, FLORIDA  
JOHN M. McHUGH, NEW YORK  
STEPHEN HORN, CALIFORNIA  
JOHN L. MICA, FLORIDA  
THOMAS M. DAVIS III, VIRGINIA  
ID M. McINTOSH, INDIANA  
MARK E. SOUDER, INDIANA  
JOE SCARBOROUGH, FLORIDA  
STEVEN C. LATOURETTE, OHIO  
MARSHALL "MARK" SANFORD, SOUTH CAROLINA  
BOB BARR, GEORGIA  
DAN MILLER, FLORIDA  
ASA HUTCHINSON, ARKANSAS  
LEE TERRY, NEBRASKA  
JUDY BIGGERT, ILLINOIS  
GREG WALDEN, OREGON  
DOUG OSE, CALIFORNIA  
PAUL RYAN, WISCONSIN  
HELEN CHENOWETH-HAGE, IDAHO  
DAVID VITTER, LOUISIANA

ONE HUNDRED SIXTH CONGRESS

# Congress of the United States

## House of Representatives

COMMITTEE ON GOVERNMENT REFORM

2157 RAYBURN HOUSE OFFICE BUILDING

WASHINGTON, DC 20515-6143

MAJORITY (202) 225-5074  
MINORITY (202) 225-5051  
TTY (202) 225-6852

HENRY A. WAXMAN, CALIFORNIA,  
RANKING MINORITY MEMBER

TOM LANTOS, CALIFORNIA  
ROBERT E. WISE, JR., WEST VIRGINIA  
MAJOR R. OWENS, NEW YORK  
EDOLPHUS TOWNS, NEW YORK  
PAUL E. KANJORSKI, PENNSYLVANIA  
PATSY T. MINK, HAWAII  
CAROLYN B. MALONEY, NEW YORK  
ELEANOR HOLMES NORTON,  
DISTRICT OF COLUMBIA  
CHAKA FATTAH, PENNSYLVANIA  
ELIJAH E. CUMMINGS, MARYLAND  
DENNIS J. KUCINICH, OHIO  
ROD R. BLAGOJEVICH, ILLINOIS  
DANNY K. DAVIS, ILLINOIS  
JOHN F. TIERNEY, MASSACHUSETTS  
JIM TURNER, TEXAS  
THOMAS H. ALLEN, MAINE  
HAROLD E. FORD, JR., TENNESSEE  
JANICE D. SCHAKOWSKY, ILLINOIS

BERNARD SANDERS, VERMONT,  
INDEPENDENT

May 18, 2000

### BY FACSIMILE

The Honorable Jacob J. Lew  
Director  
Office of Management and Budget  
Washington, D.C. 20503

Dear Director Lew:

This letter states some of my concerns with the Department of Labor's (DOL's) pending final rule, entitled "Birth and Adoption Unemployment Compensation" (popularly known as "Baby UI") which DOL submitted to the Office of Management and Budget (OMB) on April 11, 2000 for review under Executive Order (E.O.) 12866. I have concerns not only about DOL's compliance with certain provisions of E.O. 12866 and the Paperwork Reduction Act (PRA) but also about the statutory basis for this rulemaking.

First, E.O. 12286 requires agencies to provide OMB with an assessment of the potential costs and benefits of the regulatory action for all "significant" regulatory actions, i.e., including DOL's Baby UI regulatory action. For those regulatory actions which "may" have an annual effect on the economy of \$100 million or more, the Order requires agencies to provide OMB with a more detailed cost-benefit analysis (also known as a regulatory impact analysis (RIA)), including an identification and assessment of "reasonably feasible alternatives to the planned regulation" (Sec. 3(f)(1) & Sec. 6(a)(3)(C)).

I question the underlying logic behind DOL's cost estimate, which ranges from zero to \$68 million, because DOL assumed that only four States would volunteer for Baby UI. DOL's preamble admits that the \$68 million estimate "is based on the expressed interest of a small number of States" (64 FR 67975). Many public commenters challenged DOL's underestimate of the costs and instead estimated costs up to \$36 billion (e.g., see 2/2/00 U.S. Chamber of Commerce, pp. 2 & 8). If more States volunteered, the cost clearly "may" exceed the \$100 million threshold for an RIA. In fact, March 9, 2000 testimony before the House Ways and Means Subcommittee on Human Resources revealed that eight States are considering Baby UI. Commenters also expressed concern about noncompliance with the Regulatory Flexibility Act (e.g., see 2/2/00 U.S. Senate Committee on Small Business, pp. 1 & 3). As a consequence,

pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that OMB require DOL to prepare a final RIA before DOL issues a Baby UI final rule.

Section 6(b)(2)(B) of E.O. 12866 provides that OMB shall complete its review within 45 days if “there has been no material change.” OMB’s listing for the Baby UI rule surprisingly indicates that, despite 3800 public comments, which is a huge volume, DOL’s submission reflects **no** material change. How can this possibly be, especially due to the proposed rule’s vast underestimate of the possible costs of the regulatory action, necessitating an RIA?

Second, I was surprised that DOL’s preamble for the proposed experiment admits that “The Federal evaluation methodology has not yet been completed” (64 FR 67974). As OMB is aware, an evaluation is critical for any experiment, especially this one since DOL’s preamble states that the evaluation “may also serve as a basis for further expanding coverage to assist a broader group of employees to better balance work and family needs” (64 FR 67974). What will be the effects of the experiment on State taxes, State unemployment benefit levels, solvency of State unemployment funds, etc.? By what outcome performance measures will the success or failure of this experiment be judged? As a consequence, pursuant to the Constitution and Rules X and XI of the United States House of Representatives, I request that OMB require DOL to complete its proposed evaluation methodology, including the specifics of any necessary reporting and recordkeeping, and to submit its proposed paperwork burden for public comment under the PRA before DOL issues a Baby UI final rule. I also request that DOL delay the final rule’s effective date until DOL has analyzed the public comments and finalized the reporting and recordkeeping requirements essential to the evaluation of the experiment.

Third, E.O. 12866 requires OMB to review agency regulatory submissions “to ensure that regulations are consistent with applicable law” (Sec. 2(b)). I question DOL’s decision to pursue a regulatory change instead of initiating a legislative proposal. Section 604.10 in DOL’s proposed rule states, “Under [DOL’s] authority to interpret Federal unemployment compensation law, the DOL interprets the Federal able and available requirements to include experimental Birth and Adoption unemployment compensation” (64 FR 67977). However, DOL’s preamble admits that “no explicit able and available requirements are stated in Federal law” (64 FR 67972). Interestingly, there are also no able and available requirements in DOL’s codified rules governing its unemployment compensation program.

Instead, Federal law authorizes DOL to “make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which [DOL] is charged under this chapter” (42 USC §1302(a)). Federal law requires DOL to approve any State law which provides that “all money withdrawn from the unemployment fund of the State shall be used **solely** in the payment of unemployment compensation” (26 USC §3304(a)(4), emphasis added). Federal law defines “compensation” to mean “cash benefits payable to individuals with respect to their unemployment” (26 USC §3306(h)). I note that Federal law does not define “unemployment,” presumably since its meaning is commonly understood. A 1945 Social Security Board non-codified guidance document provided by DOL

this week stated, "The Board has held consistently on the basis of the legislative history of the Federal Acts, that the word 'unemployment' as used in the Social Security Act and the Federal Unemployment Tax Act refers only to unemployment due to lack of work." Baby UI is for persons who are not employed due to lack of work but voluntary choice. Also, DOL admits in Appendix B to its proposed rule that Baby UI "will require some legislation on the part of every State seeking to adopt this program" (64 FR 67977).

As a consequence, I contend that, even for an experiment, such a major substantive revision of the unemployment compensation program requires a change in Federal law. Congress did not delegate its legislative authority to DOL to make such a major revision of this program through rulemaking. The Supreme Court recently struck down a similar attempt by an executive agency, holding that the Food and Drug Administration could not regulate tobacco products without a specific authorization from Congress. The Supreme Court found that "an administrative agency's power to regulate in the public interest must always be grounded in a valid grant of authority from Congress" (*Food and Drug Administration v. Brown & Williamson Tobacco Corp.*, 120 S.Ct. 1291, p. 1315). I believe that DOL's proposed major revision of the unemployment compensation is a usurpation of legislative authority solely granted to Congress under Article I of the Constitution and, therefore, illegal.

If you have any questions about this letter, please contact Professional Staff Member Barbara Kahlow at 226-3058 or Subcommittee Staff Director Marlo Lewis on 225-1962. Thank you for considering my concerns during the course of OMB's review under E.O. 12866.

Sincerely,



David M. McIntosh

Chairman

Subcommittee on National Economic Growth,  
Natural Resources, and Regulatory Affairs

cc: The Honorable Dan Burton  
The Honorable Dennis Kucinich  
The Honorable Alexis Herman